SUPREME COURT, U. S.
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No. 73-637

In the Supreme Court of the United States

OCTOBER TERM, 1973

JERE L. DENTON, PETITIONER

v.

ROBERT C. SEAMANS,
SECRETARY OF THE AIR FORCE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

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The issue is whether the court of appeals correctly concluded that the petitioner's discharge from the Air Force as a result of administrative proceedings was valid, even though a witness petitioner wished to cross-examine did not appear at those proceedings.

1. Petitioner brought this suit in the district court to challenge the validity of his general discharge under honorable conditions from the Air Force. He alleged that the administrative proceedings which resulted in his discharge were unconstitutional and contrary to Air Force regulations, and that his discharge was without basis in the evidence. The district court granted summary judgment to the defendant. It rejected petitioner's claim that he was unfairly denied the opportunity to confront and cross-examine Col. Wyse, his former commanding

officer who had filed the charges against him, since petitioner had made no timely demand that the Air Force produce the witness, and had made no independent attempt to obtain his presence or his statement (Pet. App. xxxii-xxxiii).

The court of appeals unanimously affirmed, concluding that petitioner's inability to cross-examine Col. Wyse had no effect on the principal charge against him of associating, while a captain and senior pilot stationed in Germany, with an agent of the East German Intelligence Agency. The court noted that petitioner had not disputed the material facts underlying the charge and that his own statement established those facts (Pet. App. vii-ix). The court also found that there was no serious dispute concerning the charge of open and notorious cohabitation with a woman not his wife, and adequate evidence to support the Board's finding of failure to provide support for his dependents (Pet. App. xii, xiv). The court assumed, *arguendo,* that two of the charges, disrespect toward Col. Wyse and possession of obscene photographs, could not be sustained (Pet. App. xii-xiv).[1] The court affirmed the discharge, however, since it concluded that there was "no doubt" that the same administrative decision would have been reached on the basis of the three clearly proven charges, particularly the "very serious" charge of association with a foreign intelligence agent, and that, in fact, the two other

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[1] It expressed skepticism about the value to petitioner of Col. Wyse's participation, noting that he would have been a hostile witness, but concluded that if the charge of disrespect stood alone "we might well reverse because Denton had no chance to cross-examine Wyse. See *Greene* v. *McElroy,* 1959, 360 U.S. 474, 508" (Pet. App. xiv).

charges were simply "makeweight[s]" (Pet. App. xiv-xv).[2]

2. Petitioner claims that the court below failed to follow *Greene* v. *McElroy*, 360 U.S. 474, because it affirmed a dismissal based on the statements of a witness who was not available at the hearing. He contends that the failure to produce Col. Wyse denied him a fair hearing, and that, therefore, his discharge was improper.

The court of appeals recognized the significance of *Greene* and similar cases; indeed, it relied upon *Greene* in refusing to approve the charge of disrespect (Pet. App. xiv). It correctly found, however, that the principal charge against petitioner, association with a foreign intelligence agent, did not rest on Col. Wyse's statements. While the initial charge was filed by Col. Wyse, the court concluded that petitioner had not in fact disputed the material facts underlying the charge, and that petitioner's own statements substantiated the facts (Pet. App. vii-ix).[3] The court's conclusion is fully supported by the administrative record.[4]

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[2] The court of appeals, of course, could properly affirm on any ground supported by the district court record. *Jaffke* v. *Dunham*, 352 U.S. 280.

[3] These statements included petitioner's reply to the initial recommendation that administrative proceedings be initiated (appendix to appellant's brief in court of appeals, pp. 20-23), and his statement of October 29, 1962 to an OSI investigator (administrative record, Q, at 3-4, 13). The administrative record, which was part of the record in the district court, and petitioner's court of appeals brief, are being lodged with the Clerk of this Court.

[4] Petitioner does not claim that cross-examination of Col. Wyse would have been useful in rebutting the charge of unlawful cohabitation. It is not at all clear how such cross-examination could have helped petitioner in his defense against the charge of failure to provide for his dependents; in any event, since the

The court of appeals' upholding of the discharge notwithstanding its questions concerning two "make-weight" charges (disrespect toward Col. Wyse and possession of obscene photographs) is in accordance with the settled principle of administrative law that reversal is appropriate only if the reviewing court has substantial doubt that the same result would have been reached if the questioned findings had not been made. *Fairmont Foods Co.* v. *Hardin,* 442 F. 2d 762, 770-771 (C.A. D.C.); *Tashof* v. *Federal Trade Commission,* 437 F. 2d 707, 713 (C.A. D.C.); *Braniff Airways, Inc.* v. *Civil Aeronautics Board,* 379 F. 2d 453 (C.A. D.C.). The court properly concluded that there was "no doubt" that in this case the Board would have reached the same result in light of the "very serious" charge of association with a foreign intelligence agent and the charges of unlawful cohabitation and failure to provide for dependents.

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

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court first considered the effect of the absence of Col. Wyse's testimony, and then concluded that the evidence supported the failure—to—provide charge, the court apparently concluded Col. Wyse's testimony would not have helped petitioner in this aspect of the case.